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No. 01-1067

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

WHITE MOUNTAIN APACHE TRIBE

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record
THOMAS L. SANSONETTI
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
GREGORY G. GARRE
Assistant to the Solicitor General
ELIZABETH ANN PETERSON
JAMES M. UPTON
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

In 1960, Congress declared that a former military post in Arizona would "be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." Act of Mar. 18, 1960, Pub. L. No. 86-392, 74 Stat. 8. The question presented is whether that Act authorizes the award of money damages against the United States for alleged breach of trust in connection with such property.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 249 F.3d 1364. The opinion of the court of federal claims (Pet. App. 37a-56a) is reported at 46 Fed. Cl. 20.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 2001. A petition for rehearing was denied on August 22, 2001 (Pet. App. 58a). On November 14, 2001, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 20, 2001. On December 11, 2001, the Chief Justice further extended the time within which to file a petition for a writ of certiorari to and including January 19, 2002. The petition for a writ of certiorari was filed on January 22, 2002 (the Tuesday after a Monday holi-

day), and was granted on April 22, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. The Act of March 18, 1960, Pub. L. No. 86-392, 74 Stat. 8, states:

> [A]ll right, title, and interest of the United States in and to the lands, together with the improvements thereon, included in the former Fort Apache Military Reservation * * * , and subsequently set aside by [25 U.S.C. 277], as a site for the Theodore Roosevelt School, located within the boundaries of the Fort Apache Indian Reservation, Arizona, are hereby declared to be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose.

2. Other pertinent statutory provisions—the Tucker Act, 28 U.S.C. 1491(a), Indian Tucker Act, 28 U.S.C. 1505, and 25 U.S.C. 277—are reproduced at Pet. App. 59a-60a.

STATEMENT

This case concerns the threshold standard that governs in determining whether the United States is subject to suit for money damages for an alleged breach of fiduciary duty in connection with property that it holds in trust for an Indian Tribe.

1. The property at issue in this case is a former military post, Fort Apache, located within the boundaries of the Fort Apache Indian Reservation in east central

Arizona, just south of Whiteriver along Highway 73.[1] Fort Apache was established by the United States Army in 1870 and, with the surrounding 7579 acres, was set aside by President Grant in 1877 as a military reserve. In Arizona's territorial times, Fort Apache provided a strategic outpost from which federal soldiers —often aided by White Mountain Apache scouts— engaged Apache bands, including the one led by Geronimo. See O. Faulk, *The Geronimo Campaign* (1969). The Army operated the Fort until 1922, when an Executive Order placed it "under the control of the Secretary of the Interior" (Secretary) for use in accordance with federal law governing the disposal of abandoned military property (Act of July 5, 1884, ch. 214, 23 Stat. 103), or as otherwise provided by Congress. See S. Rep. No. 671, 86th Cong., 1st Sess. 3 (1959); Pet. App. 2a.

In 1923, Congress authorized the Secretary to establish the Theodore Roosevelt Indian School at Fort Apache, and provided "[t]hat the Fort Apache military post, and land appurtenant thereto, shall remain in the possession and custody of the Secretary of the Interior so long as they shall be required for Indian school purposes." Act of Jan. 24, 1923, ch. 42, 42 Stat. 1187 (25 U.S.C. 277). In the Act of March 18, 1960, Congress "declared" Fort Apache "to be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to

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[1] The reservation was established by an Executive Order in 1871. In 1897, Congress set aside a smaller portion of that reservation for use by the White Mountain Apache Tribe (Tribe). Act of June 7, 1897, ch. 3, 30 Stat. 64; see S. Rep. No. 671, 86th Cong., 1st Sess. 2-3 (1959). The Tribe is organized under Section 16 of the Indian Reorganization Act, 25 U.S.C. 476, and has about 12,000 members. Its government and undertakings are discussed at <<http://www.wmat.nsn.us>>.

use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." 74 Stat. 8.[2] Since 1960, the Secretary has continued to hold Fort Apache in trust, while operating the Theodore Roosevelt Indian School. Pet. App. 3a.

There are more than 30 buildings and other structures on Fort Apache. They include the officers' quarters, barracks, parade grounds, and stables and barns used by the cavalry that first occupied the fort; school facilities such as class rooms, dormitories, and a cafeteria; and administrative buildings such as storage and septic facilities. See Pet. App. 3a; Compl. App. A (listing buildings). Numerous buildings are more than a half a century old, and several date back to the fort's frontier days. Over time in the White Mountain environment, some buildings have fallen into varying states of disrepair, and a few structures have been condemned or demolished. See Pet. App. 3a.

In 1976, portions of Fort Apache, including the Theodore Roosevelt Indian School, were designated as a national historic district. Pet. App. 39a. In 1993, the Tribe adopted a master plan for repairing and restoring

[2] In 1960, approximately 410 acres of Fort Apache were used for school purposes. On the approximately 7169 acres that remained, Indians had built homes and other improvements, and had used the land for tribal grazing. S. Rep. No. 671, *supra*, at 3. In recommending passage of the 1960 Act, the Department of the Interior proposed the "subject to" clause that was subsequently enacted by Congress, explaining that it would reserve the right of the United States to continue to use "the property for the specified purposes." *Id.* at 2, 3. The Department further stated that "[t]his reserved right applies to any part of the land and improvements, and not merely to the lands and improvements that are presently in use. This will provide flexibility and permit modifications to be made in present administrative use without seeking new legislation." *Id.* at 4.

property within the historic district. In 1998, the Tribe commissioned a survey, which estimated that the cost of re-landscaping the historic district and refurbishing its buildings and improvements would be about $14 million. *Id.* at 3a-4a. The Tribe's master plan for Fort Apache was designed to maintain and rebuild the fort to preserve it "as a cultural and economic resource for the Tribe." *Id.* at 4a n.4; see Br. in Opp. 2 n.2 (discussing "Tribe's attempt to preserve [Fort Apache] for its tourism-based economy"); Tribe C.A. Reply Br. 3 (Fort Apache "has become an increasingly significant tourist attraction.").

2. In 1999, the Tribe filed this action against the United States in the Court of Federal Claims, alleging (Compl. para. 1) that the government breached "fiduciary obligations" to the Tribe in the course of the government's "use, occupation, control, supervision, management and administration" of Fort Apache "for administrative and school purposes." In particular, the Tribe alleged (*ibid.*) that the government "breach[ed] its fiduciary duty to maintain, protect, repair and preserve the Tribe's trust corpus." According to the complaint (paras. 32-33), that asserted fiduciary duty stems from the 1960 Act, as well as from certain other statutes and regulations.[3] The complaint (at 13) sought $14 million in damages to repair and refurbish Fort Apache property, as well as an unspecified amount of

[3] The additional statutes relied upon by the Tribe include the Snyder Act, 25 U.S.C. 13; National Historic Preservation Act, 16 U.S.C. 470 *et seq.*; Historic Sites, Buildings and Antiquities Act, 16 U.S.C. 462 *et seq.*; and 25 U.S.C. 177 (the Non-Intercourse Act). The courts below concluded that none of the historic-preservation or other statutes relied upon by the Tribe supported its claim for money damages, and the Tribe has not challenged those rulings in this Court. See Pet. App. 8a-10a, 47a-52a.

"[c]ompensation for the economic loss and value of annual lease/rental fees."

The United States moved to dismiss the complaint on the ground that, *inter alia*, the Court of Federal Claims lacked jurisdiction under the Tucker Act, 28 U.S.C. 1491, and the Indian Tucker Act, 28 U.S.C. 1505, which in relevant part grant jurisdiction with respect to claims "founded either upon the Constitution, or an Act of Congress or any regulation of an executive department." 28 U.S.C. 1491(a)(1). The government explained that under the Tucker Acts and this Court's decisions—including *United States* v. *Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*), and *United States* v. *Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*)—the United States is not subject to suit for money damages with respect to the trust property at issue, because neither the 1960 Act nor any other Act of Congress or implementing regulation cited by the Tribe can fairly be interpreted as mandating the payment of compensation by the government for the alleged breach of trust.

The Court of Federal Claims granted the government's motion, and dismissed the complaint for failure to state a claim. Pet. App. 37a-56a. After reviewing the Tucker Acts and this Court's *Mitchell* decisions, the Court of Federal Claims stated that the dispositive inquiry in this case is whether, under the statutes or regulations identified by the Tribe, the United States owes the Tribe "any specific responsibilities with respect to the Fort Apache buildings and improvements that give rise to a money claim for breach of trust." *Id.* at 46a. The court answered that question in the negative. The court viewed "the 1960 Act as similar to the provisions of the General Allotment Act which [were] found insufficient to establish a money-mandating claim in *Mitchell I*." *Id.* at 47a. The court

further reasoned that, unlike the statutes in *Mitchell II*, "the 1960 Act does not direct the government to manage the Fort Apache site for the benefit of the Tribe." *Id.* at 48a. Instead, "[a]s the plain language indicates, the Act reserves the Fort Apache site for the federal government's benefit and not for the benefit of the Tribe." *Ibid.*

The Court of Federal Claims rejected the Tribe's argument that the government's "day-to-day occupation, use, control, or supervision of Fort Apache under the 1960 Act" created a fiduciary relationship and attendant obligations that, if breached, would authorize the payment of money damages. Pet. App. 50a. The court explained that the Tribe's argument "misconstrues * * * *Mitchell II* by focusing on the *extent*, rather than the *nature* of control necessary to establish [such] a fiduciary relationship." *Ibid.* (emphasis added). In that regard, the court emphasized that, although the 1960 Act "may give the government complete control over the Fort Apache site, [the Act does not] require that the government manage the Fort Apache site for the purpose of protecting the Tribe's financial interests. Indeed, the 1960 Act allows the government to manage and operate the land and buildings for its own benefit for as long as it needs them." *Id.* at 52a.[4]

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[4] The Court of Federal Claims also rejected the Tribe's argument that it was entitled to relief under the common law doctrine of permissive waste. Pet. App. 55a. The court explained that the Tribe failed to show that "an action for permissive waste establishes a money-mandating claim, as required under the Supreme Court's opinion in *Mitchell II*." *Ibid.* Even under the common law, the court concluded, "an action for permissive waste, even if proper, does not ordinarily give rise to a money claim." *Id.* at 53a. Rather, "the appropriate remedy for permissive waste is generally

3. a. The Court of Appeals for the Federal Circuit reversed and remanded. Pet. App. 1a-32a. The court of appeals agreed with the Court of Federal Claims that none of the historic-preservation or other statutes relied upon by the Tribe established any substantive right to money damages against the United States for the alleged breach of trust. See *id.* at 8a-10a. But the court reached the opposite conclusion with respect to the 1960 Act. The court acknowledged that the 1960 Act does not "direct[] the United States to manage the trust corpus for the benefit of the beneficiaries, *i.e.*, the Native Americans." *Id.* at 14a. The court likewise acknowledged that "the 1960 Act does not explicitly define the government's obligations" with respect to the property. *Id.* at 19a. Nonetheless, the court "infer[red] that the government's use of any part of the property requires the government to act in accordance with the duties of a common law trustee." *Id.* at 18a.

The court of appeals then looked to "the common law of trusts, particularly as reflected in the *Restatement (Second) of Trusts*," to define the scope of the government's obligations—including the extent to which the government may be held accountable in damages for any breach of trust. Pet. App. 19a, 26a. Under the common law, the court concluded, a private trustee in the government's position "has an affirmative duty to act reasonably to preserve the trust property." *Id.* at 20a. The court further determined that, under common law principles, the failure to abide by that duty would give rise to a claim for money damages against a trustee. *Id.* at 28a. In reaching that conclusion, the court decided that the Tribe's interest in the property was

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an injunction," which the Tribe did not request in its complaint for money damages. *Id.* at 54a.

better characterized "as an indefeasibly vested future interest" than as a "contingent future interest" (for which, the court recognized, damages would not be available under common law). *Id.* at 27a-28a.

The court of appeals remanded for a parcel-by-parcel determination of what trust property is in fact "under United States control," which in the court's view, would trigger an obligation on the part of the United States that, if breached, would mandate the payment of money damages. See Pet. App. 31a ("On remand, the Court of Federal Claims must determine which portions of the property were under United States control."); *id.* at 18a. In doing so, the court noted that the "record in this case is unclear as to the extent of the government's control and use of the many buildings and grounds comprising Fort Apache." *Ibid.*

b. Chief Judge Mayer dissented. Pet. App. 33a-36a. In his view, the key question under the *Mitchell* framework is whether "the statute or regulations give the government full responsibility for managing Indian resources and land for the benefit of the Indians." *Id.* at 33a. He reasoned that—like the General Allotment Act in *Mitchell I*—the 1960 Act fails to meet that test. In particular, he noted that "[n]othing in the 1960 Act imposes a fiduciary responsibility to manage the fort for the benefit of the Tribe and, in fact, it specifically carves the government's right to unrestricted use for the specified purposes out of the trust." *Id.* at 33a-34a. Thus, Chief Judge Mayer concluded that the United States "has no fiduciary obligation to maintain the land and improvements for the Tribe that could lead to money damages," and he would have affirmed the dismissal of the Tribe's complaint on that basis. *Id.* at 34a.

Chief Judge Mayer saw no need to delve into the common law to decide that threshold issue. Nonetheless, he also disagreed with the majority's common law analysis, and would have affirmed on that "independent ground" as well. Pet. App. 36a. He explained that under the common law, "the owner of a contingent future interest has no right to sue for money damages for permissive waste," and that the Tribe only held such a contingent future interest, because its interest in the property was subject to the "condition precedent * * * that the government no longer needs to use the property for school or administrative purposes." *Id.* at 34a, 35a.

SUMMARY OF ARGUMENT

The 1960 Act does not establish any substantive right to money damages against the United States for the breach of trust alleged by the Tribe.

A. The basic principles governing the resolution of this case are well-settled and vital to the operation of the federal government. The United States is immune from suit for damages, or any other relief, unless Congress unequivocally consents to such a suit. In the Tucker Act and Indian Tucker Act, Congress has consented to certain damages actions against the government by conferring jurisdiction on the Court of Federal Claims to render judgment with respect to claims based on the Constitution, an Act of Congress or implementing regulation, or a contract with the United States. 28 U.S.C. 1491(a)(1); see 28 U.S.C. 1505. When, as here, a claim for damages is based on an Act of Congress, "a court must inquire whether [the Act] can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *Mitchell II*,

463 U.S. at 218. The touchstone, in short, is the intent of Congress.

B. The requisite statutory intent is absent in this case. The 1960 Act does not create a right to be paid a sum certain; does not speak in terms of money damages or claims; and, indeed, does not have any monetary character to it at all. The Act does declare that the property at issue is to be held "in trust." But in *Mitchell I*, this Court rejected the argument that language creating such a bare trust authorizes the payment of money damages against the government for an alleged breach of trust. The 1960 Act is an even more unlikely source of a right to money damages than the General Allotment Act, at issue in *Mitchell I*, because the 1960 Act explicitly carves out of the trust the right of the government to use the property for the government's *own* purposes "for as long as" the government deems such use necessary. 74 Stat. 8. *Mitchell II* does not require a different interpretation. The statutes and regulations in that case, the Court held, "clearly" established fiduciary management duties that, if breached, would mandate the payment of damages by the federal government. 463 U.S. at 226. The 1960 Act does not establish *any* explicit management duties, much less specific duties of a fiduciary nature that could be interpreted as mandating money damages if breached.

C. None of the secondary considerations on which the court of appeals relied justifies recognition of an implied right to a damages remedy in this case. The existence of "federal control" over Indian property or resources does not automatically subject the United States to a suit for money damages with respect to such property. Although this Court noted in *Mitchell II* that the government exercised "elaborate control" over

Indian timber lands, 463 U.S. at 225, it focused on the existence of such control not in a *factual* sense, but rather from the standpoint of the "fiduciary management duties" (*id.* at 218) explicitly created as a *legal* matter by the statutes and regulations at issue in that case. Thus, the Court did not base its holding in *Mitchell II* that money damages were available on freestanding notions of federal control. Rather, the Court rested its holding on its determination that the *statutes and regulations* at issue clearly authorized money damages. The 1960 Act at issue here contains no such authorization.

The court of appeals also erred in fashioning fiduciary duties—and potential liability for breach of those duties—from the *Restatement (Second) of Trusts*. Under the Tucker Acts and this Court's decisions interpreting those Acts, a damages claim against the federal government must be grounded upon the violation of a "source of *substantive* law," such as an Act of Congress or implementing regulation. *Mitchell II*, 463 U.S. at 216-217, 218 (emphasis added). There is no basis for subjecting the United States to liability based on unanchored, judge-made concepts of common law, and no basis for concluding that Congress intends, *sub silentio*, to assume on behalf of the United States the potential liabilities of a private, common law trustee whenever it places property in trust on behalf of an Indian Tribe (or anyone else).

Nor does the mere existence of a general relationship of trust with an Indian Tribe subject the federal government to damages claims for violation of any alleged fiduciary responsibilities flowing from that relationship. The Court squarely rejected that theory in *Mitchell I*. And although the Court did discuss the existence of the general trust relationship between the United States

and the Indian claimants in *Mitchell II*, the Court's decision in *Mitchell II* is firmly grounded on its determination that the *statutes and regulations* at issue could fairly be interpreted as authorizing damages for the violation of the duties imposed by those substantive provisions of law. Any other reading of *Mitchell II* would be precluded by the terms and history of the Indian Tucker Act, which make clear that Congress intended Indian Tribes to enjoy the *same*—not more favorable—rights to money damages against the United States as other claimants.

D. Recent decisions of this Court outside the Tucker Act context refusing to recognize implied private causes of action or remedies in the absence of unambiguous congressional intent underscore the institutional and separation-of-powers concerns that arise when courts venture beyond the intent of Congress in deciding whether, or what, remedies are available for asserted violations of federal law. Those same considerations apply with equal, if not greater, force when it comes to inferring a damages action against the sovereign itself under the Tucker Act, where Congress has not expressly provided that damages will be available. Because the only statute at issue in this case—the 1960 Act—does not clearly authorize this damages action, the court of appeals erred in allowing it to proceed.

ARGUMENT

THE 1960 ACT DOES NOT AUTHORIZE THE AWARD OF MONEY DAMAGES AGAINST THE UNITED STATES FOR THE ALLEGED BREACH OF TRUST

A. The United States Is Immune From Suit For Money Damages Except As Clearly Authorized By Congress

Although this case concerns a suit brought by an Indian Tribe, it turns on basic principles of general applicability governing the sovereign immunity of the United States from suit, and the limited statutory jurisdiction of the Court of Federal Claims to entertain claims for money damages against the United States.

1. "It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued . . . , and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Mitchell I*, 445 U.S. at 538 (quoting *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941)); see *Eastern Transp. Co.* v. *United States*, 272 U.S. 675, 686 (1927); *United States* v. *Alire*, 73 U.S. (6 Wall.) 573, 575 (1867). In determining whether the United States has granted such consent, this Court has long held that "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Mitchell I*, 445 U.S. at 538 (quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)); accord *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999); *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). That settled rule applies with equal force with respect to Indian plaintiffs. *United States* v. *Mottaz*, 476 U.S. 834, 851 (1986).

2. Pursuant to the Tucker Act and the Indian Tucker Act, Congress has granted its consent for the

United States to be sued on certain claims for money damages. 28 U.S.C. 1491, 1505. The Tucker Act grants the Court of Federal Claims jurisdiction with respect to

> any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. 1491(a)(1). The Indian Tucker Act, in turn, grants jurisdiction in the same court with respect to claims by an Indian Tribe, band, or other identifiable group of Indians, against the United States, "whenever such [a] claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe, band or group." 28 U.S.C. 1505.

As this Court has explained, the Indian Tucker Act was enacted to ensure that an Indian Tribe would enjoy the "same" rights and remedies in suits against the United States as non-Indians, but no more. *Mitchell I*, 445 U.S. at 539; see *Mitchell II*, 463 U.S. at 212 n.8. The House Report accompanying the Indian Tucker Act explains that Indian "claimants are to be entitled to recover *in the same manner, to the same extent, and subject to the same conditions and limitations*, and the United States shall be entitled to the same defenses, both at law and in equity, * * * as in cases brought [under the Tucker Act] by non-Indians." H.R. Rep. No. 1466, 79th Cong., 1st Sess. 13 (1945) (emphasis added).

The Tucker Act does "not create any substantive right enforceable against the United States for money

damages." *Mitchell II*, 463 U.S. at 216; see *Army & Air Force Exch. Serv.* v. *Sheehan*, 456 U.S. 728, 738 (1982); *United States* v. *Testan*, 424 U.S. 392, 398 (1976). And the Indian Tucker Act "no more confers a substantive right against the United States to recover money damages than does 28 U.S.C. § 1491." *Mitchell I*, 445 U.S. at 540. Thus, in order to state a cause of action for money damages under one of the Tucker Acts, a plaintiff suing other than for breach of contract must point to some other "Act of Congress," or a "regulation of an executive department," 28 U.S.C. 1491(a)(1), that "*can fairly be interpreted as mandating compensation* by the Federal Government for the damage sustained." *Mitchell II*, 463 U.S. at 216-217 (quoting *Testan*, 424 U.S. at 400, and *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967)) (emphasis added); see *Bowen* v. *Massachusetts*, 487 U.S. 879, 905-906 n.42 (1988); *Sheehan*, 456 U.S. at 739.[5] The requisite waiver of sovereign immunity exists under the Tucker Acts if, and only if, "a claim falls within th[at] category." *Mitchell II*, 463 U.S. at 218; see *OPM* v. *Richmond*, 496 U.S. 414, 431 (1990).

A statute that creates "a right to be paid a certain sum," *Eastport S.S. Corp.*, 372 F.2d at 1007, generally can be interpreted as mandating compensation for its breach. See *Nordic Village*, 503 U.S. at 34 (statute creating "right[s] to payment"); *Medbury* v. *United States*, 173 U.S. 492, 497 (1899) (statute creating right to be "repaid"). The same conclusion typically follows if a statute "speaks in terms of money damages or of a money claim against the United States." *Gnotta* v.

[5] The Indian Tucker Act also permits claims by an Indian Tribe based on a treaty of the United States or an Executive Order of the President. 28 U.S.C. 1505. No such claim is at issue here.

United States, 415 F.2d 1271, 1278 (8th Cir. 1969), cert. denied, 397 U.S. 934 (1970); see *Mitchell II*, 463 U.S. at 232 n.6 (Powell, J., joined by Rehnquist and O'Connor, JJ., dissenting) ("Although not dispositive, the monetary character of a statutory right is a strong indication that a statute 'in itself . . . can fairly be interpreted as mandating compensation.'"); cf. *Gonzaga Univ.* v. *Doe*, 122 S. Ct. 2268, 2274 (2002) (right of action has been recognized under 42 U.S.C. 1983 when a federal statute "conferred specific monetary entitlements"). In addition, statutes that "attempt to compensate a particular class of persons for past injuries or labors" have been interpreted as mandating compensation for the damages sustained. *Bowen*, 487 U.S. at 906 n.42; see generally Developments in the Law, *Remedies Against the United States and Its Officials*, 70 Harv. L. Rev. 827, 882-883 (1957).[6]

This Court has observed that "the substantive source of law may grant the claimant a right to recover damages either 'expressly or by implication.'" *Mitchell II*, 463 U.S. at 217 n.16; but cf. *Sheehan*, 456 U.S. at 739-740 ("*Testan* [held] that the Tucker Act provides a remedy only where damages claims against the United States have been authorized explicitly."). But the Court is reluctant to recognize a damages remedy against the United States under the Tucker Acts when a statute does not clearly sanction one. See *Testan*, 424 U.S. at 400 ("We are not ready to tamper with these established principles [concerning the reach of the Tucker Act] because it might be thought that they

[6] The Court has suggested that an action also may be brought under the Tucker Act when the United States has "improperly exacted or retained" money. *Testan*, 424 U.S. at 401; see *Sheehan*, 456 U.S. at 739 n.11. This case does not involve any such claim.

should be responsive to a particular conception of enlightened governmental policy."); see also *Mitchell II*, 463 U.S. at 218 ("Of course, in determining the general scope of the Tucker Act, this Court has not lightly inferred the United States' consent to suit.").

That restraint reflects the general rule that waivers of sovereign immunity must be unequivocally expressed. See *Mitchell I*, 445 U.S. at 538; *Richmond*, 496 U.S. at 432. And such restraint is now all the more necessary in light of the Court's repeated refusal in recent decisions to recognize implied private causes of action or remedies outside the Tucker Act context. See, *e.g.*, *Gonzaga*, 122 S. Ct. at 2275 (federal statute must contain "unambiguously conferred right" for suit to lie under Section 1983); *Correctional Servs. Corp.* v. *Malesko*, 122 S. Ct. 515 (2001) (declining to extend *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to new context); *Alexander* v. *Sandoval*, 532 U.S. 275 (2001) (no implied right of action to enforce disparate-impact regulations under Title VI); *FDIC* v. *Meyer*, 510 U.S. 471, 483-486 (1994) (declining to recognize implied right of action under *Bivens* against federal government).

3. This Court's *Mitchell* decisions specifically involved actions by Indian claimants under the Tucker Acts governed by the basic principles outlined above concerning claims against the United States generally. In the *Mitchell* litigation, the Quinault Tribe and individual Indians sought damages from the United States for alleged breach of fiduciary duties with respect to timberlands on the Quinault Indian Reservation that had been allotted in trust to individual Indians. In *Mitchell I*, the Court held that the General Allotment Act—under which the United States holds allotted lands "in trust for the sole use and benefit of

[Indian allottees]," 445 U.S. at 541 (quoting 25 U.S.C. 348)—did not authorize a damages action against the United States for alleged mismanagement of timber resources on allotted lands. The Court explained that the General Allotment Act created "only a limited trust relationship between the United States and the [Tribe]," and did "not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." *Id.* at 542.[7] Thus, the Court held, the Act did not support "[a]ny right of [the Indians] to recover money damages for Government mismanagement of timber resources." *Id.* at 546.

In *Mitchell II*, the Court considered a different set of statutes and regulations and held that those provisions, unlike the General Allotment Act, could "fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties they impose[d]." 463 U.S. at 219. In so holding, however, the Court emphasized that the provisions established "comprehensive responsibilities of the Federal Government in managing the harvesting of Indian timber," *id.* at 222; see *id.* at 221 (regulations "required the preservation of Indian forest lands in a perpetually productive state"), and that "the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources." *Id.* at 226.[8] The Court

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[7] The Court explained that Congress provided for allotted lands to be held "in trust" simply because it wanted to prevent alienation of the land and to ensure that allottees would be immune from state taxation. *Mitchell I*, 445 U.S. at 544.

[8] Indeed, each of the plaintiffs' claims in *Mitchell II* tracked specific duties set forth in applicable statutes or regulations. See 463 U.S. at 210; see also, *e.g.*, 25 U.S.C. 406(a) (proceeds from

distinguished *Mitchell I*, stating: "In contrast to the bare trust created by the General Allotment Act, the statutes and regulations now before us clearly give the Federal Government *full responsibility* to manage Indian resources and land *for the benefit of the Indians*." *Id.* at 224 (emphasis added); see *id.* at 226.[9]

As explained below, a proper understanding of the *Mitchell* decisions—and application of the basic principles governing suits against the United States and limitations on implied rights to recover money damages—compels the conclusion that the 1960 Act does not authorize the damages action in this case.

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timber sales "shall be paid to the owner or owners or disposed of for their benefit"); 25 U.S.C. 413 (administrative fees must be "reasonable"); 25 U.S.C. 466 (Secretary must manage Indian forestry units "on the principle of sustained-yield management"); 25 C.F.R. 163.4 (1985) (requiring sustained-yield management); 25 C.F.R. 163.7(c) (1985) (timber "shall be appraised" and sold at not less than appraised value, except as authorized); 25 C.F.R. 163.18 (1985) (administrative fees must be "reasonable").

[9] Justice Powell, joined by then-Justice Rehnquist and Justice O'Connor, dissented in *Mitchell II*. 463 U.S. at 228-238. In their view, even the statutes and regulations in that case failed to confer "the necessary legislative authorization of a damages remedy" against the United States, because "[n]one of [those provisions] contains any 'provision . . . that expressly makes the United States liable' for its alleged mismanagement of Indian forest resources and their proceeds or grants a right of action 'with specificity.'" *Id.* at 230 (quoting *Testan*, 424 U.S. at 399, 400). They emphasized that "courts are not free to dispense with 'established principles' requiring explicit congressional authorization for maintenance of suits against the United States simply 'because it might be thought that they should be responsive to a particular conception of enlightened governmental policy.'" *Id.* at 232 (quoting *Testan*, 424 U.S. at 400).

B. The 1960 Act Does Not Contain The Requisite Clear Authorization By Congress Of A Suit For Money Damages For The Alleged Breach Of Trust

1. The damages claim at issue is based solely on the 1960 Act. That Act, however, cannot "fairly be interpreted as mandating compensation by the Federal Government for the [alleged] damages sustained" by the Tribe. *Mitchell II*, 463 U.S. at 217. The 1960 Act does not refer to any "right to be paid a certain sum," *Eastport S.S. Corp.*, 372 F.2d at 1007, nor does it "speak[] in terms of money damages or of a money claim against the United States," *Gnotta*, 415 F.2d at 1278. To the contrary, the Act simply "declared" Fort Apache "to be held by the United States in trust for the [Tribe], subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." 74 Stat. 8. That declaration has no "monetary character" at all. *Mitchell II*, 463 U.S. at 232 n.6 (dissent). And, on its face, the 1960 Act is a much less likely source of a substantive right to money damages than either of the statutes that this Court found inadequate to confer such a right in *Testan*.

In *Testan*, federal employees brought suit against the United States claiming that they were entitled to a higher salary under the Classification Act and damages under the Back Pay Act for lost pay due to their allegedly improper classification. Applying the Tucker Act principles discussed above, the Court held that neither statute could fairly be interpreted as mandating compensation by the government for the alleged wrong. The Court explained that, although the Classification Act created "substantive standards for grading particular positions," and was expressly motivated by the "principle of equal pay for substantially equal work,"

the Act did not explicitly mandate—and could not fairly be interpreted as mandating—compensation by the United States for the alleged misclassification. 424 U.S. at 399-400; see *id.* at 401-402. In addition, although the Back Pay Act *did* create a "monetary remedy" for certain wrongful acts, the Court held that that Act, "as its words so clearly indicate, was intended to grant a monetary cause of action only to those who were subjected to a reduction in their duly appointed emoluments or position." *Id.* at 405-407.

Unlike the Classification Act, the 1960 Act at issue in this case does not explicitly impose any substantive standards *at all* on the conduct of the government, much less standards or duties owed to a third party that are sufficiently specific to form the predicate for a monetary claim. Compare *Gonzaga*, 122 S. Ct. at 2273 (federal statute must "confer[] entitlements sufficiently specific and definite to qualify as enforceable rights" under Section 1983) (internal quotation omitted); *id.* at 2274 ("specific, individually enforceable rights"). To the contrary, the 1960 Act simply places property "in trust," then reserves to the government the broad "right" to use the property for the government's *own* purposes "for as long as" the government deems necessary. 74 Stat. 8. In addition, unlike the Back Pay Act, the 1960 Act contains no reference to any monetary relief for any alleged wrong.[10]

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[10] In *Testan*, this Court relied upon the Court of Claims' decision in *Eastport Steamship Corp.* v. *United States*, *supra*. See *Testan*, 424 U.S. at 402. *Eastport Steamship* involved a suit for money damages against the federal government by a shipping company that alleged that the Federal Maritime Commission had improperly withheld its consent to a proposed foreign sale of a vessel—which was required under the Shipping Act—"while the agency was secretly formulating an illegal policy of selling such approvals for money." 372 F.2d at 1007. The company sought damages for lost business due to the agency's alledgedly improper refusal to approve the foreign sale. The Court of Claims held that jurisdiction was lacking under the Tucker Act on the ground that the Shipping Act "cannot be held to command, in itself and as correctly interpreted, the payment of money to the claimant." *Id.* at 1008. The court explained that, "[o]n its face the [statute] is simply a regulatory measure," and that "not a word in the text suggest[s] that the United States will compensate an applicant who suffers a business loss because of the Commission's improper failure to grant [a requested approval]." *Id.* at 1009. So too here, not a word in the 1960 Act suggests that the United States owes any duties to the Tribe or is obligated to compensate the Tribe for any alleged damages with respect to the property, much less suggests that the United States owes such duties or is obligated to pay damages while it is still using the property for government purposes.

2. The fact that the 1960 Act places the property at issue "in trust" does not mean that it mandates compensation for the alleged breach of trust. That is the lesson of *Mitchell I*. The statute in that case—the General Allotment Act—explicitly obligated the United States to hold allotted lands "in trust for the *sole* use and benefit of the Indian [allottees]." *Mitchell I*, 445 U.S. at 541 (emphasis added). The Court of Claims in *Mitchell I* reasoned that "[t]he trust language in the statute means that compensation can be recovered for a breach of trust [under the Tucker Act]." *Mitchell* v. *United States*, 591 F.2d 1300, 1303 (Ct. Cl. 1979). Similarly, the dissenting Justices in this Court reasoned that the General Allotment Act could "fairly be interpreted as mandating compensation" because it "explicitly creates a 'trust.'" *Mitchell I*, 445 U.S. at 547 (White, J., joined by Brennan and Stevens, JJ.); see *ibid.* ("The Act could hardly be more explicit as to the status of allotted lands. They are to be held by the

United States '*in trust for the sole use and benefit of the Indian [allottees].*'"). The Court disagreed.

The Court explained that the General Allotment Act "created only a *limited* trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources." 445 U.S. at 543 (emphasis added). See *Mitchell II*, 463 U.S. at 224 (In *Mitchell I*, "this Court recognized that the General Allotment Act creates a trust relationship between the United States and Indian allottees but concluded that the trust relationship was limited."). Accordingly, even though the General Allotment Act explicitly placed the allotted Indian lands "in trust" for the Indian allottees, the Court held that "[a]ny right of the [Indian claimants] to recover money damages for Government mismanagement of timber resources must be found in some source other than that Act." *Mitchell I*, 445 U.S. at 546.

The trust relationship created by the 1960 Act is even more limited than the one in *Mitchell I* and, thus, an even more unlikely source of a substantive right to money damages for breach of trust. Whereas the statute in *Mitchell I* required the United States to hold property "in trust for the *sole* use and benefit of the Indian [allottees]," 445 U.S. at 541 (emphasis added), the 1960 Act specifically carves *out* of the trust the right of the federal government to use Fort Apache for the government's *own* purposes "for as long as" the government deems such use necessary. 74 Stat. 8. Indeed, the 1960 Act "subject[s]," and thus subordinates, the trust to that open-ended right of the government. *Ibid.*

As Chief Judge Mayer explained in his dissent:

> Nothing in the 1960 Act imposes a fiduciary responsibility to manage the fort for the benefit of the Tribe and, in fact, it specifically carves the government's right to unrestricted use for the specified purposes out of the trust. Although the school is for the benefit of the Tribe, the 1960 Act expressly permits, but does not require, the government to use the fort as an Indian school. The use of the phrase "for as long as they are needed," far from expressing a fiduciary obligation, vests discretion in the Secretary of the Interior to determine how long to operate the Indian school.

Pet. App. 33a-34a; see *id.* at 48a (Court of Federal Claims) ("As the plain language indicates, the [1960] Act reserves the Fort Apache site for the federal government's benefit and not for the benefit of the Tribe."); *id.* at 52a (same). The Act's carve-out provision, in itself, compels the conclusion that the statute does not authorize money damages for any alleged breach of trust while the government is still using the property for its *own* purposes.

In any event, even if Congress had not included that carve-out provision, the resulting—and still bare—trust created by the 1960 Act would not support the Tribe's damages claim. Many of the buildings or structures on Fort Apache are more than a century old and most are decades old. There is no evidence that in enacting the 1960 Act, Congress intended to impose on the Secretary of the Interior an ongoing duty to maintain those buildings beyond their useful life, much less to undertake historic-preservation efforts at Fort Apache and to mandate the payment of damages to the Tribe if the Secretary failed to keep the fort in the state necessary to boost the Tribe's own "tourism-based economy." Br.

in Opp. 2 n.2; see Pet. App. 4a n.4. Putting fiscal constraints to one side, all can agree that the historic preservation or restoration of Fort Apache is a worthy ideal. But recognizing that ideal does not mean that the 1960 Act creates a substantive right to recover damages against the government based on allegations that it is not doing, or spending, more to keep the fort in its Old West shape.

3. Nothing in *Mitchell II* suggests a different conclusion. In *Mitchell II*, the Court held that the statutes and regulations at issue did support the Tribe's damages claim against "the Federal Government for violations of its fiduciary responsibilities in the management of Indian property." 463 U.S. at 228. But the Court grounded that holding on its determination that the statutes and regulations established clear and specific fiduciary obligations on the part of the government to manage the property for the benefit of the Indians. See *id.* at 226 ("Because the statutes and regulations at issue in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, they can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained."); *id.* at 219-225. In addition, the Court emphasized that, unlike the statute in *Mitchell I*, "the statutes and regulations now before us give the Federal Government *full responsibility* to manage Indian resources and land *for the benefit of the Indians*." *Id.* at 224 (emphasis added).

This case is entirely different. It does not involve a "comprehensive" regulatory scheme under which the federal government has assumed "*full* responsibility to manage Indian resources and land for the benefit of the Indians," 463 U.S. at 222, 224 (emphasis added), or, indeed, anything remotely resembling such a regime.

As the court of appeals acknowledged, unlike the statutes and regulations in *Mitchell II* (see *id.* at 219-223), "neither the 1960 Act nor any pertinent regulation sets forth clear guidelines" with respect to management of the trust property in this case, and there is "no * * * requirement" in the statute or any regulation that the United States manage the property "for the benefit" of the Tribe. Pet. App. 14a, 18a. As Chief Judge Mayer underscored in his dissenting opinion below, "[n]othing in the 1960 Act imposes a fiduciary responsibility to manage the fort *for the benefit of the Tribe*"; instead, the Act "specifically carves the government's right to unrestricted use for the specified purposes out of the trust." *Id.* at 33a-34a (emphasis added).

In addition, as this Court observed in *Mitchell II*, the statutes and regulations in that case "clearly require[d] that the Secretary manage Indian resources so as to generate proceeds for the Indians," and thus at least had an arguable monetary flavor to them. 463 U.S. at 226-227; see *id.* at 221-222 ("The regulatory scheme was designed to assure that the Indians receive 'the benefit of whatever profit [the forest] is capable of yielding.'"). The statute here is not in any way addressed to the generation of proceeds or profit making. The 1960 Act was passed as an administrative housekeeping measure to deal more formally with the underlying title to the land in the wake of the military's departure from Fort Apache, while allowing the Department of the Interior to continue to use the property as it had before. See S. Rep. No. 671, *supra*, at 3.[11] To the extent that the

[11] The Senate Report accompanying the 1960 Act states: "Inasmuch as (1) the 7,579 acres were originally a part of a much larger Indian reservation, (2) they were withdrawn for military purposes and later reserved for Indian educational purposes, (3) only 410

statute refers to the use of the property, it is to the government's own right "to use any part of the land and improvements for *administrative or school purposes*," 74 Stat. 8 (emphasis added), not for the generation of proceeds or profits for the Tribe.

4. None of the general canons of statutory construction in Indian cases on which the Tribe relies (see Br. in Opp. 13) supports a contrary result. Under general principles of sovereign immunity, the Tucker Acts, and this Court's *Mitchell* decisions, the Tribe must point to a provision of an Act of Congress or implementing regulation that confers a substantive right and can fairly be interpreted as mandating the payment of money damages for a violation. There is not a word in the 1960 Act—the only substantive source of law on which the Tribe relies—that suggests the existence of such a mandate. Just as Indian canons of construction cannot overcome the plain meaning of an Act of Congress, see, *e.g.*, *Chickasaw Nation* v. *United States*,

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acres are still needed for school purposes, (4) and the remainder are completely surrounded by the Indian reservation land, it would be impractical to dispose of them for purposes other than Indian use and we believe that it is reasonable to restore them to the reservation *subject to the right of the United States to continue to use them for school or administrative purposes as long as they are needed*." S. Rep. No. 671, *supra*, at 2, 3 (emphasis added) (quoting Department of the Interior letter). In addition, as noted above, the Act's carve-out provision was added at the suggestion of the Department of the Interior to "provide flexibility and permit modifications to be made in the present administrative use without seeking new legislation." *Id.* at 4. There is no evidence in the legislative history of the 1960 Act (or any other source) that Congress had in mind the management of the property for the generation of any proceeds on behalf of the Tribe, whether from operation of the Theodore Roosevelt Indian School or from efforts to attract tourists to Fort Apache.

122 S. Ct. 528, 535-536 (2001); *Negonsott* v. *Samuels*, 507 U.S. 99, 110 (1993); *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986), those canons cannot supply the affirmative textual basis required for the Tribe's claim when the Act of Congress on which it relies is silent. And, in any event, Congress made clear when it enacted the Indian Tucker Act in 1946 that the *same* principles are to govern recognition of a damages remedy for an Indian Tribe that apply in the case of a non-Indian plaintiff. See p. 15, *supra*.

Moreover, the Tribe's invocation of the Indian canons to claim a property interest under the statutory grant in derogation of the express statutory reservation to the United States of the right to use both the land and the improvements for its own government purposes is contrary to the established canon that "land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *Watt* v. *Western Nuclear, Inc.*, 462 U.S. 36, 59 (1983).

C. The Court Of Appeals Erred In Concluding That Money Damages Are Nonetheless Available For The Alleged Breach Of Trust

In concluding that money damages are available for the alleged breach of trust, the court of appeals ranged far from the text of the 1960 Act, or any indicia of actual congressional intent in enacting it. None of the secondary considerations on which it relied support recognition of a damages remedy.

1. The court of appeals reasoned that, under *Mitchell II*, "control alone is sufficient to create a fiduciary relationship" that is enforceable against the United States in an action for money damages. Pet.

App. 15a. The Tribe agrees. See Br. in Opp. 17 n.22 (In *Mitchell II*, "[t]his Court recognized elaborate control by the Government over Indian property as an *independent* basis for its finding of a [money-mandating] duty.") (emphasis added); see *id.* at 19-20 & n.24. That reasoning is unavailing.

a. Most fundamentally, the control test conflicts with the well-established principle—recognized and applied by this Court in both *Mitchell I* and *Mitchell II*—that to establish that the United States is accountable for money damages, a plaintiff must point to an Act of Congress, implementing regulation, or other source of substantive *law* that "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Mitchell II*, 463 U.S. at 217; see *Mitchell I*, 445 U.S. at 540; *Testan*, 424 U.S. at 400. Under the approach adopted by the court of appeals, by contrast, the liability of the United States in connection with a given piece of property or resource would turn on a *factual* determination concerning the extent of the government's control over the property or resource. Such an inquiry would not be anchored in any statutorily specified duty owed to the Tribe, and would be far removed from the customary focus on the intent of Congress in deciding what claims fall within a waiver of sovereign immunity.

Furthermore, the control test adopted by the court of appeals is directly contradicted by the *Mitchell* decisions, especially the second. In finding that the statutes and regulations at issue established a substantive right to money damages, the Court in *Mitchell II* did point to the fact that the government had assumed "elaborate control over forests and property belonging to Indians," *i.e.*, the trust property. 463 U.S. at 225. But the Court did not state, much less hold, that such control "alone"

(Pet. App. 15a) supported the Tribe's damages claim. And the Court did not point to federal control in the abstract, but rather in conjunction with its finding that the statutes and regulations at issue "clearly" obligated the government to "manage Indian resources and land *for the benefit of the Indians*." 463 U.S. at 224 (emphasis added). At the same time, the Court focused on federal control not in a *factual* sense, but instead from the standpoint of "fiduciary management duties" (*id.* at 218) rooted in the express terms of the statutes and regulations at issue. *Id.* at 224-225.

The Court explained in detail in *Mitchell II* that the pertinent statutes and regulations created extensive and carefully delineated management duties with respect to the trust property at issue. See 463 U.S. at 219-223; see *id.* at 220 ("The regulations addressed virtually every aspect of forest management."); *ibid.* ("Congress imposed * * * strict[] duties upon the Government with respect to Indian timber management."); *id.* at 222 (in amending the pertinent statutes, Congress "again emphasiz[ed] the Secretary of the Interior's management duties"); *ibid.* ("The timber management statutes and the regulations promulgated thereunder establish the 'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber.") (internal citations omitted). The 1960 Act, by contrast, does not express *any* management duties with respect to the property at issue, and in particular does not specify any duties required to be undertaken for the benefit of the Tribe.[12]

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[12] The Tribe has suggested that certain lower court decisions support the notion that federal control alone "may be the basis for a money-mandating claim." Br. in Opp. 23; see *id.* at 23-25 & nn.29-32. Some of those decisions predate this Court's *Mitchell* deci-

b. The control test also cannot be squared with this Court's recognition of the need for clear and predictable rules in the area of sovereign immunity, see *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991) ("In traditionally sensitive areas, * * * the requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision."), quoted in *Raygor* v. *Regents of the Univ. of Minn.*, 122 S. Ct. 999, 1006 (2002), as well as in the area of jurisdictional determinations such as that called for by the Tucker Acts, see *Lapides* v. *Board of Regents of the Univ. Sys. of Ga.*, 122 S. Ct. 1640, 1645 (2002) ("[J]urisdictional rules should be clear."); see also *Gonzaga*, 122 S. Ct. at 2277 ("[W]e fail to see how relations between the branches are served by having courts apply a multi-factor balancing test to pick and choose which federal requirements may be enforced by §1983 and which may not.").

The test adopted by the court of appeals in this case could scarcely be more at odds with that objective. Under the court's decision, the United States faces potential liability for breach of trust "only as to the specific parcels of trust property that the federal

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sions, and some do not even involve claims for money damages (*Pyramid Lake Paiute Tribe of Indians* v. *United States Dep't of the Navy*, 898 F.2d 1410 (9th Cir. 1990); *Northern Arapahoe Tribe* v. *Hodel*, 808 F.2d 741 (10th Cir. 1987)). None of the cases involved statutes, like the 1960 Act, that expressly reserve to the government the right to use the trust property for its own purposes. In any event, to the extent that the cases in fact suggest that a substantive right to damages against the government automatically springs from federal control or use affecting a trust resource, those decisions are fundamentally mistaken. They cannot be squared with the decisions of this Court—not to mention the text of the Tucker Acts—recognizing that a substantive right to damages from the federal government must be granted by Congress.

government has used and controlled" and—the court of appeals cryptically added—"possibly the grounds immediately surrounding such parcels." Pet. App. 18a. As a result, the determination whether (or to what extent) the government may be liable for breach of trust requires at the threshold a fact-intensive, parcel-by-parcel inquiry into "the extent that the federal government has * * * used buildings to the exclusion of the Tribe." *Ibid.* That is a highly amorphous inquiry on which to base the liability of a sovereign for money damages. More to the point, there is no evidence in the 1960 Act that Congress intended to expose the United States to potential liability in such a haphazard and changing manner.

2. The court of appeals reasoned that, since "the 1960 Act does not explicitly define the government's obligations" with respect to the trust property, it was proper "to *infer* that the government's use of any part of the property requires the government to act in accordance with the duties of a common law trustee" and, further, to *infer* that such use subjects the government to the same potential liability in money damages that would be imposed on a simple common law trustee. Pet. App. 18a (emphasis added); see *id.* at 19a (because the 1960 Act "does not explicitly define the government's obligations," we "look to the common law" to define those obligations); *id.* at 31a (under the common law, "the Tribe's claim gives rise to a cognizable claim for money damages"). That reasoning, too, is fatally flawed.

a. As discussed above, under the doctrine of sovereign immunity and the Tucker Acts (except in a suit founded upon a contract), only the Constitution, an Act of Congress, or an implementing regulation can give rise to a substantive right to money damages against

the United States. See 28 U.S.C. 1491(a)(1), 1505. See *Mitchell II*, 463 U.S. at 218 ("[F]or claims against the United States 'founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department,' a court must inquire whether *the source of substantive law* can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.") (emphasis added; internal citation omitted). Only Congress, and not the courts, may compromise the immunity of the United States from suit for money damages or, indeed, any other remedy. See *United States* v. *United States Fid. & Guar. Co.*, 309 U.S. 506, 513 (1940); *United States* v. *New York Rayon Importing Co.*, 329 U.S. 654, 660 (1947). There accordingly is no basis for finding that the United States may be liable in money damages based on resort to unanchored, judge-made principles of common law. The court of appeals' reliance on the common law in determining—and defining the scope of—the United States's potential liability in this case was therefore misplaced. See Pet. App. 18a, 26a.

Indeed, in looking to the common law of trusts to authorize the imposition of damages against the United States, the court of appeals turned the settled rule on its head. The rule established by this Court's precedents is that there is *no* substantive right to recover money damages from the United States unless a statute "in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Testan*, 424 U.S. at 402. Under the decision below, by contrast, the government's potential liability "must be determined by the general law of trusts *as modified by the 1960 Act*." Pet. App. 26a (emphasis added); see *id.* at 24a. Congress legislates with the settled understanding that the United States

is immune from suit for money damages unless it clearly expresses a contrary intent. See *Nordic Village*, 503 U.S. at 33-34. That settled and necessary understanding leaves no room for a regime under which the United States is subject to the potential liability of a private trustee under the "general law of trusts" (Pet. App. 26a), except to the extent that Congress "modifie[s]" (*ibid.*) such liability.

b. The court of appeals believed that resort to the common law was supported by decisions in Indian cases in which this Court has referred to the common law of trusts. See Pet. App. 19a (citing *Seminole Nation* v. *United States*, 316 U.S. 286, 296 (1942); *United States* v. *Mason*, 412 U.S. 391, 398 (1973); *Department of the Interior* v. *Klamath Water Users Protective Ass'n*, 532 U.S. 1, 14 (2001)). In those cases, however, the Court simply referred to the common law in evaluating the scope of the United States' duties in circumstances in which it was understood that the United States had assumed trust duties under a provision of positive law with respect to the particular matter at issue, and not—as the court of appeals did here—to find a right to recover damages against the United States in the absence of any statute, implementing regulation, or treaty that could fairly be interpreted as mandating the payment of compensation for damages sustained.[13]

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[13] The money claims in *Seminole Nation* were predicated on alleged violations of the United States' express promises in treaties or statutes to pay sums certain to the Tribe. 316 U.S. at 293-294. In *Mason*, the Court found no breach of any fiduciary obligation on the part of the United States, and thus had no occasion to consider the circumstances in which the United States may be held to have waived its immunity from suit for money damages for breach of trust. 412 U.S. at 400. And *Klamath Water Users* did not even involve a claim for money damages for breach

It is one thing to say that the United States, when acting as a guardian to an Indian Tribe, may assume certain duties that are analogous to those recognized at common law between a private trustee and its beneficiaries. See *Nevada* v. *United States*, 463 U.S. 110, 127 (1983). It is quite another to say that simply by declaring certain property to be held "in trust," Congress has created a cause of action against the United States for money damages for any obligations that would apply to a private trustee. That conclusion follows *a fortiori* from *Mitchell I*, where the statute at issue provided for the property to be held "in trust" for the *sole* benefit for the Indians, not, as here, subject to the right of the government to use the property for its own purposes In *Mitchell I*, the Court rejected the argument that the plaintiffs were entitled to money damages to compensate for the alleged breach of trust simply "because that remedy is available in the ordinary situation in which a trustee has violated a fiduciary duty and because without money damages [plaintiffs] would have no effective redress for breaches of trust." 445 U.S. at 541-542.

This Court has recognized that the federal government performs a role in its relations with the Indian Tribes that is different from that of a simple private trustee. See, *e.g.*, *Nevada*, 463 U.S. at 127-128. Whatever relevance an analogy to a private trustee may have in certain circumstances with respect to the Indian Tribes, the Court has never suggested that the

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of trust; it instead involved a claim for *documents* under the Freedom of Information Act. See 532 U.S. at 6. Cf. *United States* v. *Creek Nation*, 295 U.S. 103, 109 (1935) (money claims involving alleged misappropriation of property that the United States gave to the Tribe by treaty in "fee simple").

United States assumes the full potential *liability* of a common law trustee whenever it enters into a relationship with an Indian Tribe that has some characteristics of a trust. If it did, there would have been no reason for the Court to devote so much attention in *Mitchell I* and *Mitchell II* to identifying a substantive right under the particular statutes and regulations at issue in those cases to recover money damages for the asserted breaches of trust.[14]

c. The court of appeals' reliance on common law principles produced another anomaly in this case. Under the court's decision, the potential liability of the United States for millions of dollars in damages for alleged breach of trust ultimately turned not on the terms of the 1960 Act, or any other source of substantive law, but instead on a debate among the panel over whether the Tribe's interest in the Fort Apache property was better characterized as a "contingent future interest," as the panel majority believed (Pet. App. 27a-28a), or an "indefeasibly vested future interest," as the dissent argued (*id.* at 33a).

In our view, Chief Judge Mayer correctly resolved that issue. See Pet. App. 33a-36a. But in deciding whether the United States is immune from the Tribe's damages claims, there should be no need for this Court to plumb that issue of property law because—consistent with the *Mitchell* decisions and other precedents discussed above—the dispositive question in this case is whether *the statute* on which the Tribe's claim is

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[14] In a similar vein, this Court in *Nordic Village*, 503 U.S. at 39, refused to "[r]esort to the principles of trust law" to find that the United States had waived its immunity from a bankruptcy trustee's claims for money damages, and specifically indicated that "trust decisions" involving private entities "are irrelevant" when it comes to determining the liability of the *government*.

based "can fairly be interpreted as mandating compensation by the Federal Government for damages sustained." *Mitchell II*, 463 U.S. at 226. The 1960 Act contains no such mandate, and that is true quite apart from whether the Tribe's interest in the property might be a "contingent future interest," an "indefeasibly vested future interest," or some other interest. If Congress had intended to authorize the damages action in this case, it would have said so directly, and not left the matter for the courts to decide by choosing from among malleable property law concepts.

3. Relying on *Mitchell II*, the court of appeals reasoned that, "'[g]iven the existence of a trust relationship, it naturally follows that the Government should be liable in damages for the breach of its fiduciary duties.'" Pet. App. 26a (quoting *Mitchell II*, 463 U.S. at 226). In *Mitchell II*, this Court did state that "the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of the trust." 463 U.S. at 226.[15] But that language does not have the touchstone significance assigned to it by the court of appeals.

a. To begin with, in *Mitchell I*, this Court squarely rejected the notion—which was advanced by both the court of appeals and the dissenting Justices in *Mitchell I*—that the government's potential liability in money

[15] For support, the Court referred in a footnote to its decisions in *Seminole Nation* and *Creek Nation*, as well as certain lower court decisions. See 463 U.S. at 226 n.31. The Tribe's claim for money damages in each of those cases, however, was specifically based on the violation of a *substantive right* granted by the United States in a treaty or statute, and not on violation of mere common law duties. See note 13, *supra*.

damages "follows naturally from the existence of a trust and of fiduciary duties." 445 U.S. at 550 (dissent); see pp. 23-24, *supra*. Although the Court reached a different conclusion in *Mitchell II* with respect to whether money damages were authorized by Congress, the Court in no way repudiated the result or reasoning in *Mitchell I*, and, to the contrary, carefully distinguished *Mitchell I*. See *Mitchell II*, 463 U.S. at 217-218, 224.

b. In any event, the language quoted by the court of appeals cannot bear the weight assigned to it by the court of appeals. If, as the court below apparently believed (see Pet. App. 26a), the existence of a trust relationship alone may subject the United States to money damages for breach of that relationship, then *Mitchell I* not only is dead wrong, but there was no reason for the Court in *Mitchell II* to frame its analysis in terms of whether the statutes and regulations at issue could "fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties they impose," 463 U.S. at 219; to devote five pages of its decision to a detailed review of the statutes and regulations at issue, *id.* at 219-223; and to "conclude" its decision by stating "that the statutes and regulations at issue here can fairly be interpreted as mandating compensation by the Federal Government for violations of its fiduciary responsibilities in the management of Indian property," *id.* at 228.

Indeed, the sentence in the Court's decision immediately preceding the one quoted by the court of appeals (Pet. App. 26a) begins a new paragraph as follows: "Because *the statutes and regulations at issue* in this case clearly establish fiduciary obligations of the Government in the management and operation of Indian lands and resources, *they* can fairly be interpreted as mandating compensation by the Federal Gov-

ernment for the damages sustained." 463 U.S. at 226 (emphasis added). The existence of a trust relationship itself is insufficient to support a damages claim against the United States for breach of that relationship or any unstated fiduciary duties a court might believe should flow from it when, as here, the requisite statutory right is lacking.

c. Any other interpretation of *Mitchell II* is precluded by the Indian Tucker Act. That Act was enacted to ensure that Indian claimants would enjoy the *same* rights and remedies in suits against the United States as non-Indian claimants, but also left the United States with the same defenses in suits brought by Indians as it enjoys in other Tucker Act litigation. *Mitchell I*, 445 U.S. at 539; see p. 15, *supra*. In any other Tucker Act case, the mere existence of a trust relationship between the plaintiff and the United States would be insufficient to establish jurisdiction under the Tucker Act, or a substantive right to money damages against the federal government. *A fortiori*, the same is true with respect to a suit brought against the United States by an Indian Tribe under the Indian Tucker Act.[16]

Furthermore, as this Court recognized in *Mitchell I*, "[f]or claims arising *before* August 13, 1946, * * * [the Indian Claims Commission Act] did waive the sover-

[16] The Tucker Act states that, *inter alia*, the Court of Federal Claims has jurisdiction to entertain claims against the United States based on the Constitution, an Act of Congress or implementing regulation, or a contract with the United States. See 28 U.S.C. 1491(a)(1). Congress could have added to the list a provision for claims based on a trust relationship with the United States. But it did not do so in the Tucker and, perhaps even more telling, did not do so in the Indian Tucker Act. See *United States* v. *Vonn*, 122 S. Ct. 1043, 1049 (2002) ("expressing one item of [an] associated group or series excludes another left unmentioned").

eign immunity of the United States" with respect to certain "claims against the United States based on legal and equitable principles and on considerations of 'fair and honorable dealings.'" 445 U.S. at 540 n.2 (quoting 25 U.S.C. 70a (1976)). But, the Court continued, Congress did *not* intend that Act "to be a waiver of sovereign immunity for any alleged breach of trust accruing *after* August 13, 1946." *Ibid.* (emphasis added). Rather, Congress intended "'that with respect to all grievances that may arise hereafter Indians shall be treated on the same basis as other citizens of the United States in suits before the Court of Claims.'" *Ibid.* (quoting 92 Cong. Rec. 5313 (1946) (Rep. Jackson)). The court of appeals therefore erred in granting the Tribe in this case a special right to damages—in the absence of any clear statutory authorization—based on the existence of a trust relationship with the government.

d. The United States occupies a unique relationship with the Indian Tribes that has long been characterized as one of "guardianship" or "trust." See *United States* v. *Kagama*, 118 U.S. 375, 382-384 (1886); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). The United States fully accepts the implications of that relationship and the undertakings that go with it. Not all those undertakings, however, create legally enforceable *duties* on the part of the United States, much less duties that are enforceable in a suit for money damages against the United States.

This Court applies the same principles in determining whether the United States is immune from suit for money damages in a breach-of-trust action brought by an Indian Tribe as it does in determining whether the government is immune from damages actions in other contexts. See *Mitchell II*, 463 U.S. at 218-219; *Mitchell I*, 445 U.S. at 538; see also *Mottaz*, 476 U.S. at 851;

Klamath & Moadoc Tribes of Indians v. *United States*, 296 U.S. 244, 250, 255 (1935); *Blackfeather* v. *United States*, 190 U.S. 368, 376 (1903). A proper application of those principles results in the conclusion that the Tribe in this case has failed to state a claim for money damages. Neither the Tribe's, nor a court's, conception of enlightened Indian policy may alter that conclusion. See *Testan*, 424 U.S. at 400 ("We are not ready to tamper with the[] established principles [concerning the reach of the Tucker Act] because it might be thought that they should be responsive to a particular conception of enlightened governmental policy.").

D. The Court Should Reaffirm That The Intent Of Congress Governs In Determining When Private Rights Or Remedies Are Established By Federal Law

This Court's Tucker Act decisions establish a clear, workable analysis under which damages are not available against the United States for a claim founded upon an Act of Congress unless the Act "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Testan*, 424 U.S. at 400; see pp. 14-18, *supra*. The court of appeals' decision in this case shifts the focus from the intent of Congress to fact-bound notions of federal control, murky concepts of common law, and open-ended principles of Indian stewardship. That approach would greatly increase the potential liability of the United States and, equally problematic, leave the government and its officials without any clear guidance as to when their actions may subject the United States, and the public's fisc, to damages claims. As the court of appeals' decision illustrates, questions concerning the existence of federal control will be litigated on a parcel-by-parcel basis, and questions concerning the contours

or application of common law doctrines will be debated by the courts and subject to appeals. That is no regime on which to rest threshold determinations affecting a sovereign's amenability to suit for money damages.

In recent cases, this Court has emphasized that it has "sworn off the habit of venturing beyond Congress's intent" when it comes to recognizing private causes of actions and the private remedies available in such actions. *Alexander*, 532 U.S. at 287. As the Court has explained, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy"—"[s]tatutory intent is determinative." *Id.* at 286. "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." *Id.* at 287. See *Gonzaga*, 122 S. Ct. at 2279 ("[I]f Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action."); *id.* at 2276-2277; *Malesko*, 122 S. Ct. at 519 n.3 ("[W]e have retreated from our previous willingness to imply a cause of action where Congress has not provided one.").

The principles of judicial restraint—and separation-of-powers concerns—underlying those decisions are all the more important when it comes to determining whether Congress has authorized a substantive right to recover money damages against the United States itself. The intent of Congress is determinative. Because Congress has not authorized the damages claim in this case, the Tribe's action should be dismissed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
THOMAS L. SANSONETTI
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
GREGORY G. GARRE
Assistant to the Solicitor General
ELIZABETH ANN PETERSON
JAMES M. UPTON
Attorneys

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